

1-1901-9616-2
MN OSH Division Docket Nos. 5035, 5036
OSHI ID Nos. Y6804 090-94,
M66176 021-94

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

Gary Bastian, Commissioner
Department of Labor and Industry,
State of Minnesota,

Complainant,

ORDER DENYING
MOTION TO DISMISS

v.

Glenwood Bridge, Inc.,

Respondent.

A Motion to Dismiss and Vacate Citations was served on Complainant, the Department of Labor and Industry (DOLI or the Department) on June 8, 1995 by Respondent, Glenwood Bridge, Inc. (Glenwood Bridge). The Department replied to the Motion with a Memorandum on July 3, 1995. Glenwood Bridge requested oral argument in this matter. The Judge has considered the request and does not believe that such argument will materially aid in the understanding of the issues presented by the Motion. The record on this Motion closed with the receipt of the Complainant's Memorandum on July 3, 1995.

Timothy A. Sullivan, Best & Flanagan, 4000 First Bank Place, 601 Second Avenue South, Minneapolis, Minnesota 55402-4331, submitted the Motion on behalf of Glenwood Bridge. Helen G. Rubenstein, Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155-4199, submitted the Respondent's Memorandum.

Based on the record herein, the Administrative Law Judge makes the following:

ORDER

The Respondent's Motion to Dismiss and Vacate Citations is DENIED.

Dated: July _____, 1995.

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

Glenwood Bridge has styled its pleading a Motion to Dismiss and Vacate Citations. A motion to dismiss is brought solely on the pleadings and is granted only where the moving party shows that the pleadings seek relief which cannot be granted. Minn.R.Civ.P. 12.03. Glenwood Bridge has relied upon affidavits and other evidence outside the pleadings to support some of the issues in its motion. The proper form for the issues which rely upon outside information, in an administrative context, is summary disposition. Summary disposition is the administrative equivalent of summary judgment under Minn.R.Civ.P. 56. Minn. Rule 1400.5500(K). The summary disposition standard will be applied in ruling on those issues in Respondent's Motion that rely upon information not in the pleadings.

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985). The evidence must be viewed in a light most favorable to the non-moving party. Sauter, 70 N.W.2d at 353. The party defending the motion must present "specific facts showing there is a genuine issue for trial." Minn.R.Civ.Proc. 56.05; see also, Rademacher v. FMC Corp., 431 N.W.2d 879, 881 (Minn. App. 1988).

Some facts in this matter appear to be undisputed. Glenwood Bridge was conducting work on a noise reduction project at a worksite along Highway 169, south of Princeton, Minnesota. That site was observed by Occupational Health and Safety Inspectors (OSHLs) who visited the site and informed employees and a supervisor for Glenwood Bridge that tie-offs were required when using a platform for work over ten feet above the ground. Several days later, the site was revisited and two citations were issued, one for use of the platform and the other for employees riding in the bed of a moving flatbed truck while the bed was on a slope. The citations were issued under the authority of the then-Acting Commissioner Gary Bastian. The proposed fines for the use of the crane and platform total \$225,000.

Glenwood Bridge cites the failure of the OSHIs to properly present their credentials, to conduct opening and closing conferences, and to afford "walkaround rights" to the employer as procedural defects which require dismissal. DOLI has responded to the claimed failure with a detailed response identifying the actions of the OSHIs during their inspections and at times in between, when the OSHIs contacted a corporate officer with Glenwood Bridge to inform him that having workers on a platform suspended from a crane to a height of ten feet or higher violates the crane standard. Both OSHIs have averred that they did present their credentials upon entering the worksite, conducted both opening and closing conferences, and afforded walk around rights on each occasion that the inspectors entered onto the site. The conduct of the

OSHI is a genuine issue of material fact and can only be resolved at the full hearing of this matter.

Glenwood Bridge appears to be relying upon the actions of one OSHI, sitting in his car along Highway 169 and observing the site, as violative of fundamental rights of the employer. Respondent maintains that this action, on October 25, 1994, is an inspection. No case law or statute is cited to support this contention. The OSHI did not enter onto the worksite, did not leave his car, and did not issue any citation from his observations. The OSHI did note that the equipment on the worksite carried the potential for a hazard and resolved to watch the site as he travelled between his office and a site in Princeton he was inspecting. Observing a worksite in plain view from a public highway is not in itself an inspection. See Waste Recovery Cooperative of Minnesota, et. al v. County of Hennepin, 504 N.W.2d 220, 229-230 (Minn.App. 1993)(holding there is no legitimate expectation of privacy in a workplace visible from a public street). Discovering whether anything more than that observation took place can only happen at the full hearing of this matter.

Glenwood Bridge asserts that the twelve willful violations cited by DOLI lack factual and statutory support. Respondent maintains that the total proposed penalties are greater than those that could be sought in a criminal case. Nine specific citations were issued regarding the use of the crane on the worksite to lift a work platform. Each citation carried a fine of \$25,000. Each citation referenced a different standard regarding the use of a crane. Were criminal penalties to be sought, charges could be laid on the same basis, one per standard alleged to have been violated. The maximum fine that can be sought against an employer committing a willful violation of a standard is \$70,000 per violation. Minn. Stat. § 182.666, subd. 1 (1994). The statute calls for fine to be assessed per violation, not per incident or per item of equipment in use. DOLI has asserted that it followed a national guideline in assessing a \$25,000 fine for each citation on the crane. Since the amount assessed is below the maximum permissible under the statute, there is no basis to dismiss the citations for a lack of statutory authority in assessing the total fine.

Counsel for Respondent asserts that there is "virtually no conceivable way" that serious injury or death could result from the use of the platform on the back of a flatbed truck. Glenwood Bridge Memorandum, at 12. One of the OSHIs who inspected the site and witnessed the use of the truck averred that injuries could arise "because employees could have slid off of the truck and been run over or pinned between the wall and the truck." Young Bird Affidavit, at 2. This is a genuine issue of material fact that can only be resolved with a hearing.

Respondent maintains that there is no evidence of willfulness in the conduct cited by DOLI. In response, the Department has provided a narrative of the events that occurred outside the worksite. These events including sending a copy of the standard applicable to suspending work platforms from cranes by facsimile transmission to a corporate officer of Glenwood Bridge and obtaining an agreement from that officer to remove the crane and platform from use. Upon inspecting the worksite at noon on the next day, the OSHIs found the crane and platform in use. The foreman was asked if he

has spoken to that corporate officer that day and the foreman responded that he had. When asked if the corporate officer informed the foreman that the crane and platform were to be removed from service, the foreman responded that the officer had not. McGinn Affidavit, at 5-6. Taking this evidence in the light most favorable to the Department, this evidence is sufficient to demonstrate genuine issues of material fact as to whether willful violations occurred.

Respondent asserts that the term “willful” is not adequately defined to determine if a willful violation occurred in this case. DOLI has cited a number of definitions of “willful,” all used in the occupational health and safety area. Taking the evidence discussed in the foregoing paragraph in the most favorable light to the Department (as the Judge must on a motion for summary disposition), there is sufficient evidence of conduct meeting any of the cited definitions to support the cited violations as being “willful.”

The citation was issued by then-Acting Commissioner Bastian. Glenwood Bridge asserts that citations may only be issued by the Commissioner. DOLI cited Minn. Stat. § 15.06 as the statutory authority for acting commissioners to carry out all the responsibilities of a Senate-approved commissioner. Respondent maintains that Minn. Stat. § 15.06 is either unconstitutional or “exceeds the authority expressly provided in the enabling statute, Minn. Stat. § 182.65, et seq.” Glenwood Bridge Memorandum, at 13.

An Administrative Law Judge lacks the authority to declare a statute unconstitutional. In the Matter of Rochester Ambulance Service, a Division of Hiawatha Aviation of Rochester, Inc., 500 N.W.2d 495, 499-500 (Minn.App. 1993). That argument must be brought to another forum. The Legislature did not rely upon the authority of Minn. Stat. § 182.65, et seq. in passing Minn. Stat. § 15.06. A canon of statutory construction holds that statutes must be construed so as not to reach an absurd or unreasonable result. Minn. Stat. § 645.17(1). By construing Minn. Stat. § 15.06 as applicable to Minn. Stat. 182.65, et seq., no conflict arises. There is adequate evidence that the Legislature intended this result, since Minn. Stat. § 15.06, subd. 1 expressly applies the statute to the Commissioner of Labor and Industry. There is no basis for dismissing the citations due to the circumstance of an Acting Commissioner being in charge of the Department when the citations were issued.

The last argument put forward by Respondent is that the fines are unconstitutional for being excessive and, therefore, the citations must be dismissed. The purpose of this contested case hearing is, inter alia, to determine if the fines are excessive. If the fines are found to be excessive, then the Judge is obligated to recommend a proper fine, not dismiss the citations. Minn. Stat. § 182.661, subd. 3.

Respondent has not shown any aspect of the citations to be statutorily defective so as to require them to be dismissed. Genuine issues of material fact remain to be decided in this matter and therefore summary disposition is not appropriate. Respondent’s Motion to Dismiss and Vacate Citations is DENIED.

G.A.B.

TDD: 612/341-7346

October 12, 1993

John B. Lennes, Jr., Commissioner
MN Department of Labor and Industry
443 Lafayette Road
St. Paul, MN 55155

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Energyx Corporation/WINCO, Inc.
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RE: John B. Lennes, Jr., Commissioner, Department of Labor and Industry,

Dear Parties:

Enclosed and served upon you by mail is the Administrative Law Judge's Order Granting Motion for Summary Affirmance in the above-entitled matter. Also enclosed to Commissioner Lennes is the official record.

Sincerely,

GEORGE A. BECK
Administrative Law Judge

Telephone: 612/341-7601

GAB:llc

Enclosure

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

AFFIDAVIT OF SERVICE BY U.S. MAIL

Laurie L. Clos, being first duly sworn, hereby deposes and says that on the 12th day of October, 1993, at the City of Minneapolis, county and state aforementioned, she served the attached Order_Granteeing_Motion_for_Summary Affirmance;_OAH_Docket_No._1-1901-8278-2 by depositing in the United States mail at said City of Minneapolis, a true and correct copy thereof, properly enveloped, with first class postage prepaid, and addressed to the individuals named herein:

John B. Lennes, Jr., Commissioner
MN Department of Labor and Industry
443 Lafayette Road
St. Paul, MN 55155

Donald L. Schemmel, Vice President
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Julie A. Leppink
Assistant Attorney General
520 Lafayette Road, Suite 200
St. Paul, Minnesota 55155-4199

Laurie L. Clos

Subscribed and sworn to before me
this 12th day of October, 1993.

Notary Public